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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 214 Term, 194—.

JACKSON & PERKINS COMPANY,
Petitioner

vs.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, Trading as BICKLEY'S AUTO EXPRESS,
Respondents

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, as of January Term, 1944, No. 262.

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SUPREME COURT OF THE UNITED STATES

No. Term, 194

JACKSON & PERKINS COMPANY,
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vs.

MUSHROOM TRANSPORTATION COMPANY, INC., WILLIAM BICKLEY, trading as BICKLEY'S AUTO EXPRESS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of JACKSON AND PERKINS COMPANY respectfully shows to this Honorable Court as follows:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a Petition by Jackson and Perkins Company for a Writ of Certiorari to the Supreme Court of Pennsylvania to review a decision of that Court (R.), which affirms a final judgment of the Court of Common Pleas No. 5 of the County of Philadelphia, Pennsylvania, in favor of the Respondents.

The suit was brought by Petitioner (Plaintiff below) to recover damages for loss caused by the freezing of dor-

mant rose plants while they were being carried by the Respondents, common carriers in interstate commerce. The Respondent-carriers have denied that the goods were frozen, and each has denied that it was the delivering carrier or that it was negligent.

The facts of the case are briefly as follows:

On January 5, 1942, the petitioner, the largest rose-grower in the world, delivered to the initial carrier, a common carrier by motor truck, at petitioner's freight depot in Newark, New York, some sixteen thousand dormant budded rosebushes. The consignee was Florex Gardens, North Wales, Pennsylvania. At the time of delivery to the initial carrier, the rosebushes were in good condition (R. pp. 59a, 63a, 70a). The time of year during which they were shipped was the usual season for shipping dormant rosebushes (R. p. 109a). The bushes were delivered by the initial carrier to respondent Mushroom Transportation Co., Inc., and by the latter to respondent William Bickley, trading as Bickley's Auto Express. Possession of the bushes was given the consignee by Bickley at which time the bushes were frozen and of no value (Adjudication, R. pp. 313a, 314a).

Action in assumpsit was brought by the petitioner in the Court of Common Pleas of Philadelphia County, Pennsylvania, against Mushroom and Bickley to enforce their respective liabilities. Both denied liability. Each denied it was the delivering carrier under Section 219 of the Federal Motor Carriers Act of 1935, as amended.

The rosebushes were dormant at the time of shipment (R. pp. 55a-78a). The usual season for shipping dormant budded rosebushes is from January through March, that is, in the winter (R. pp. 109a, 135a). The rosebushes when shipped were packed with moss around the roots and with excelsior around the buds (or tops) (R. pp. 63a, 84a, 135a-136a, 162a). There were thirty-two boxes in the shipment, each being of solid wood approximately 20″ x 22″ x 44″ (R. pp. 66a, 81a, 114a, 162a). Around the bushes, the moss

and the excelsior there was wrapped a layer of thick brown insulating paper which was deposited in the wooden case (R. pp. 84a-85a, 114a). Each case was wrapped with two layers of kraft insulating paper (R. pp. 84a-85a, 163a, 257a). This is the customary and usual manner in which dormant budded rosebushes are shipped (R. pp. 63a, 76a, 135a-136a, 153a, 159a, 160a-161a).

Prior to the shipment of the bushes each box was opened and the contents examined; the bushes were found to be dormant and living; there was sufficient moss, excelsior and kraft paper to protect them (R. pp. 59a, 63a, 70a). Dormant budded rosebushes so packed stand a temperature of zero provided they are not exposed directly to the action of the elements for a considerable period (R. pp. 77a-78a, 163a, 169a-170a, 283a-284a). The temperature at the place of shipment at the time of shipment was 15 degrees above zero (R. p. 105a), and mean temperature at Philadelphia during the course of the shipment was 15, 18 and 11 degrees above zero, respectively, on January 6, 7, and 8, 1942 (R. p. 309a).

It was arranged to ship the thirty-two boxes of rosebushes to North Wales (R. pp. 58a-59a). In pursuance of the arrangement, at about 8:30 on Monday morning, January 5, 1942, he directed the loading of the thirty-two boxes in one shipment into the closed van of Goetzman and Newman of Newark, Wayne County, New York (R. pp. 81a-82a, 107a). The rosebushes were delivered by Goetzman and Newman to the Rochester, New York, warehouse of respondent Mushroom Transportation Company, Inc., some time during the morning of January 5 (R. pp. 236a-237a). Rochester, New York, is approximately thirty miles from Newark, Wayne County, New York, and the ordinary driving time is one hour and a half.

On January 7, 1942, at 10 o'clock A. M., nineteen boxes of the shipment were delivered by Bickley (R. pp. 113a, 117a, Def. Bickley's Exhibit No. 1 at R. p. 299a). When the first part of the shipment arrived it was opened and found to be frozen. This frozen condition was noted

not merely in the top bushes in each case, but in the bushes generally throughout the cases. The bushes in each box were packed in layers and that same condition was noted throughout every layer in every box (R. pp. 115a, 150a, 152a, 157a, 158a, 162a).

The rosebushes in the second part of the shipment were likewise frozen upon arrival, and were subjected to the same thorough examination by the consignee with its own workers and also examination by representatives of both petitioner and respondents (R. pp. 118a, 125a, 147a, 157a, 158a, 162a).

At the time of delivery of the first part of the shipment by Mushroom to Bickley at Mushroom's loading platform at or about 4 P. M. on Tuesday, January 6, 1942, a skim of frost or ice was noticed upon the "tall" side of the cases. The paper was stuck to the wooden box by a skim of ice and frost (R. pp. 181a, 188a, 195a). When the second shipment of boxes was received by the consignee they were taken from an *open-back* truck of Bickley's (R. p. 147a).

Four stickers or labels were pasted on the outside of the boxes in which the rosebushes were shipped (R. pp. 67a-69a, 113a, 246a, 257a). These labels read as follows:

> "This box contains living plants, highly perishable. Must be kept from extreme heat or cold. Easily frozen. Transfer points please protect from extreme heat or cold" (R. p. 67a, Plaintiff's Exhibit 4 at page 117a).

Common Pleas Court Opinion

The adjudication of the Trial Judge and the opinion of the court en banc dismissing exceptions to the adjudication found for the respondent carriers and judgment was entered in their favor.

The Opinion of the Court of Common Pleas (R. 332a) holds that dormant rosebushes are perishable and deteriorate from a cause inherent in themselves, and that accordingly the burden was upon the Petitioner to establish the

negligence of the Respondent-carriers. The Court refused to follow the Federal rule as to burden of proof and held that the burden on the Respondents was "only to show that it had used due care" (R. 338a); that the Petitioner had assumed the risk of freezing when it shipped dormant rosebushes; that there was no evidence of negligence on the part of the Respondents; and that it was unnecessary to determine which of the Respondents was the delivering carrier. Judgment was entered by the Court of Common Pleas for the Respondents.

THE OPINION OF THE SUPREME COURT

The Supreme Court of Pennsylvania, which is reported in 351 Pa. 583 (R.), affirmed the judgment of the Court of Common Pleas. The Supreme Court ignored the question of Federal burden of proof with the statement "We need not discuss Plaintiff's argument on the burden of proof". It held that freezing of the dormant rose plants was due to an inherent vice and affirmed the judgment of the lower Court.

A Petition for Re-hearing was filed on March 26, 1945, but was denied by the Supreme Court of Pennsylvania on April 9, 1945.

B. REASONS FOR THE ALLOWANCE OF THE WRIT

1. The Supreme Court of Pennsylvania ignored the rule that questions of the burden of proof and the quantum of proof necessary to carry that burden are matters of Federal law: *New Orleans and Northeastern Railroad Company v. Harris*, 247 U.S. 367, at 372 (1918); *Southern Rwy. v. Prescott*, 240 U. S. 632; *Central Vermont Railroad Co. v. White*, 238 U. S. 507 (1915); *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942), reversing 344 Pa. 69 (1941), and failed to apply the Federal law in determining whether the respondents had exculpated themselves from liability for goods frozen while in transit: *Chicago S. W. W. R. Co. v. C. C. Whitnack Produce Co.*, 258 U. S. 369 (1922) (in which apples were frozen).

2. The Supreme Court of Pennsylvania failed to apply the Federal rule which requires that after the shipper has proved that the goods left the shipper's control in good condition and arrived in a damaged condition, the carrier must prove that the loss was caused solely and entirely by an excepted peril:—either Act of God, act of public authority, act of public enemy, act of the shipper, or inherent nature of the goods, and that failing such affirmative proof by the carrier, the shipper is entitled to recover as a matter of law: *Whitnack Case*, supra; *Schnell v. The Vallescura*, 293 U. S. 296 (1934); *Washington and G. R. Co. v. Varnell*, 98 U. S. 479; *Chic. & E. I. R. Co. v. Collins Produce Co.*, 249 U. S. 186, *aff'g*, 235 F. 857.

3. The Supreme Court of Pennsylvania failed to recognize that under the Federal rule the nature of the goods is immaterial as regards burden of proof.

4. The Supreme Court of Pennsylvania failed to apply the Federal rule requiring the respondent carriers to establish that the goods frozen while in transit were frozen solely because of prevailing temperatures sufficiently low so that the goods would freeze even though handled with due care.

5. The Supreme Court of Pennsylvania failed to realize that under the Federal rule, the test of a carrier's liability is *not* whether it performs its "contract of carriage without negligence" (R. p.) but rather, whether it brings itself within the five exceptions to a carrier's liability set forth above in Paragraph Two. By adopting the standard of care as the criterion, the court legislated a new exception into the Federal law.

6. The Trial Court permitted the respondents to avoid liability on the hypothetical ground that the goods may have frozen through no fault of the respondent and failed to apply the Federal rule that the cause of damage can never be conjectural. There was no evidence to support a finding that the goods froze as a result of temperature conditions alone. The only finding supported by the evidence is that the goods had been exposed.

7. The Supreme Court of Pennsylvania failed to apply the Federal rule that assumption of risk is not an excepted cause. If by assumption of risk it meant that the loss was due to act of the shipper, which is an excepted cause, such a conclusion was unsupported by the evidence, since the carrier offered no evidence that the loss was caused solely and entirely by act of the shipper, which, under the cases, means that the shipper either must have done some act concealing the nature of the goods from the carrier, or interfered with the carrier's treatment of the goods in transit by instructions forbidding the protection of the goods in transit by the carrier.

8. The Supreme Court of Pennsylvania has decided an important Federal question contrary to the principle enunciated by this Honorable Court in *Garrett v. Moore-McCormack Company*, 317 U. S. 239, reversing 344 Pa. 69.

The decision of the Supreme Court of Pennsylvania is of the utmost national importance, not only because of its refusal to accept the supremacy of the Federal law, but also because of the lack of uniformity which it will permit

if each state follows its own burden of proof rule. Under the decision of the Pennsylvania Supreme Court, the enforcement of a right created by Federal law no longer depends upon national uniform principles, but upon the chance circumstance that the law of the forum deems it desirable to adopt a rule on burden of proof favorable to the Plaintiff. This lack of uniformity of decision under a Federal statute enacted under the commerce power of the national Congress is a grave matter which merits the consideration of this Honorable Court.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and send to this Court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case, numbered on its Docket No. 262, January Term, 1944, and captioned "Jackson and Perkins Company, Appellant, v. Mushroom Transportation Company, Inc., Defendant, Bickley's Auto Express, William Bickley", and that the judgment of the Supreme Court of Pennsylvania in this case may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief as may be just; and your Petitioner will ever pray.

JACKSON AND PERKINS COMPANY,
By: RONALD A. ANDERSON,
JOHN M. SMITH, JR.
Counsel for Petitioner.

I hereby certify that I have examined the foregoing Petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

RONALD A. ANDERSON,
JOHN M. SMITH, JR.
Counsel for Petitioner.